

CENTRE FOR INTERNATIONAL AND PUBLIC LAW FACULTY OF LAW

NEWSLETTER

Issue 1/2003
April 2003

Dear Friends of CIPL

This newsletter covers the period January to March 2003, a time when familiarity with the principles of international law has become even more significant for those seeking to understand world events. The expertise of Centre members has been much called upon in recent weeks by the media and others seeking clarification on issues of international law relating to the war in Iraq.

On 26 March the Centre organised, in conjunction with the Australian and New Zealand Society of International Law (ANZSIL) and the International Law Association (Australian Branch), a Current Issues Forum entitled **Confronting Iraq: Does International Law Matter?** (details on page 2).

We have also welcomed the opportunity to work even more closely in recent weeks with the President of ANZSIL, Associate Professor Don Rothwell from the University of Sydney, who is currently a Fellow in the Law Program at the Research School of Social Sciences.

Recent writings by Centre members are available on our website <http://law.anu.edu.au/CIPL>. Details of forthcoming seminars will also be posted there.

Cathy Hutton
Editor

Centre Events in March

The Centre arranged three events in March in collaboration with other organisations.

6 March Lecture

(with The National Europe Centre at the ANU and the National Institute of Government and Law, ANU)

The United Nations' Role in Promoting Human Rights

Mr Jan Kavan, President of the United Nations General Assembly

The text of Mr Kavan's speech is on the Centre's website <http://law.anu.edu.au/CIPL>

13 March Seminar

(with the Australian Institute of Administrative Law (AIAL) and the National Institute of Government and Law, ANU)

Judicial Review, Privative Clauses and the High Court

Dr David Bennett AO, QC and The Hon Duncan Kerr MP



LtoR: David Bennett, Duncan Kerr, Bert Mowbray, Michael Coper

Current Issues Forum

26 March

(with the Australian and New Zealand Society of International Law (ANZSIL) and the International Law Association (Australian Branch))

Confronting Iraq: Does International Law Matter?

The forum was introduced and chaired by the ANZSIL President Don Rothwell, Faculty of Law, University of Sydney and Visiting Fellow, Law Program RSSH, ANU. The vote of thanks was given by Margaret Brewster, President of the ILA (Australian Branch).

Speakers were:

- Andrew Byrnes (CIPL)
Quot advocati, tot sententiae: who's right and how do we know?
- Hilary Charlesworth (CIPL)
Geese and ganders: the role of international humanitarian law
- Don Greig (CIPL)
Force: out on a limb?
- Pene Mathew (CIPL)
Privatising international security
- Christopher Ward (Sydney Bar)
Who owns the Charter?: interpretation of resolutions

The forum allowed a range of views to be presented. For example, Don Greig argued that the 'coalition of the willing' could claim a legal basis for their actions, while Pene Mathew strongly opposed this argument.



LtoR: Andrew Byrnes, Don Greig, Pene Mathew, Don Rothwell, Christopher Ward, Hilary Charlesworth

Some papers from the forum may be available soon. Please check the Centre's website <http://law.anu.edu.au/CIPL>

Conferences 2003

ANZSIL Conference

4-6 July 2003, Wellington NZ

The annual conference of the Australian and New Zealand Society of International Law (ANZSIL) will take place in Wellington, New Zealand from 4-6 July. The conference organising committee is currently finalising the program and the brochure will be sent out later this month to all those registered with the Centre as having an interest in international law.

<http://law.anu.edu.au/ANZSIL>

Annual Public Law Weekend

7-9 November 2003

An exciting program has been planned around the theme '**The Australian Constitution in Troubled Times**'. This year the conference is a joint event of CIPL and the Australian Association of Constitutional Law (AACL). For further information about the program, contact the Conference Directors

James.Stellios@anu.edu.au or
Fiona.Wheeler@anu.edu.au

General inquiries:

Cathy.Hutton@anu.edu.au

Congratulations

Dennis Pearce AO

Emeritus Professor Dennis Pearce was appointed an Officer (AO) in the General Division in the Australia Day Awards. Professor Pearce was honoured for service to the law as an academic, particularly through seminal work on topics of statutory interpretation, delegated legislation and administrative law; as a teacher, researcher and university administrator; and as a significant contributor in the areas of public administration, press regulation, parliamentary law and copyright control.

Congratulations

John McMillan



Longtime Centre member Professor John McMillan has been appointed the new Commonwealth Ombudsman and took up his five-year term on 17 March.

John's career to date fits him well to perform the work of Ombudsman. That task requires experience, wisdom, careful judgment and a sound knowledge of administrative law standards. The job also demands a delicate balancing of the interests of the public and public administration. John's experience as Sub-Dean of the Law Faculty honed many of those skills. His previous public interest work particularly in access to information (demonstrated so ably in his Professorial Lecture for the Faculty in 2002), his involvement in many community organisations including the Braddon Residents Association, coupled with his consultancies for parliamentary and governmental inquiries, his membership and Presidency of the Australian Institute of Administrative Law, his legal practice work with Clayton Utz Lawyers, and his knowledge of and insights into public law principles also make him ideally suited to take on his new role. His appointment has been warmly commended in the wider community.

John will be a loss to the Faculty. His knowledge and understanding of Faculty history and affairs, his clear thinking on matters of process and policy, and his energy have been of considerable value in key Faculty debates. We wish him well in his new career and hope he will return to us at the end of his term.

Robin Creyke

Jessup Moot Competition

Centre members **Wayne Morgan** and **Madelaine Chiam** were the coaches of the 2003 ANU team in the Jessup International Law Moot Competition and many Centre members participated in the judging of the Australian rounds. The Jessup Moot involves teams from over 50 countries, who prepare written memorials and oral arguments on a problem of international law. This year's Jessup problem raised issues of state responsibility and crimes against humanity in the aftermath of civil war. The ANU team was ranked 9th out of the 17 competing in the 2003 Australian rounds, and just missed out on the quarter finals (by 3 points).

NEWS FLASH

The Australian team, from the University of Western Australia, won the Jessup Cup at the grand final in Washington DC on 5 April.

Congratulations to all Jessup participants!

Centre Publications

Law and Policy Papers

The final paper in the 2002 series (Paper 22) is now available.

Tribunals of Inquiry and Royal Commissions

Professor Geoffrey Lindell

An examination of the balance between the legitimate demands of the public right to know and the need to protect the privacy of individuals.

Comparative perspectives on Bills of Rights

The papers from this one-day conference held at the National Museum of Australia on 18 December 2002 and jointly organised by CIPL with the ANU's National Institute of Government and Law (NIGL), will be published shortly. Four experts give their views on Bills of Rights in other countries: Professor Penelope Andrews (South Africa), Professor Andrew Byrnes (Hong Kong), Ms Francesca Klug OBE (United Kingdom) and Rt Hon E W Thomas DCNZM QC (New Zealand).

FEATURE ARTICLE

This article appeared in *The Age* and *The Sydney Morning Herald* on 26 February 2003. The 42 signatories included ANU Law Faculty and Centre members

Don Anton
Peter Bailey
Andrew Byrnes
Hilary Charlesworth
Madelaine Chiam
Ann Kent

Penelope Mathew
Anne McNaughton
Wayne Morgan
Donald Rothwell (Law Program RSSH)
James Stellios

Waging war crimes?

The initiation of a war against Iraq by the self-styled 'coalition of the willing' would be a fundamental violation of international law. International law recognises two bases for the use of force. The first, enshrined in article 51 of the United Nations Charter, allows force to be used in self-defence. The attack must be actual or imminent. The second basis is when the UN Security Council itself authorises the use of force as a collective response to the use or threat of force. However, the UNSC is itself bound by the terms of the UN Charter and can only authorise the use of force if there is evidence that there is an actual threat to the peace (in this case, by Iraq) and that this threat cannot be averted by any means short of force (such as negotiation, further weapons inspections etc).

Members of the 'coalition of the willing', including Australia, have not yet presented any persuasive arguments that an invasion of Iraq can be justified at international law. The United States has proposed a doctrine of 'pre-emptive self-

defence' that would allow a country to use force against another country it suspects may attack it at some stage. This doctrine contradicts the cardinal principle of the modern international legal order and the primary rationale for the founding of the UN after the second world war – the prohibition on the unilateral use of force to settle disputes.

The weak and ambiguous evidence thus far presented to the international community by US Secretary of State Colin Powell to justify a pre-emptive strike underlines the practical danger of a doctrine of pre-emption. A principle of pre-emption would allow particular national agendas to completely destroy the system of collective security contained in Chapter VII of the UN Charter and return us to the pre-1945 era where might equalled right. Ironically, the same principle would justify Iraq now launching pre-emptive attacks on members of the coalition because it could validly argue that it feared an attack.

But there is a further legal dimension for both Saddam Hussein on the one hand and Messrs Bush, Blair and Howard and their potential coalition partners on the other to consider. Even if the use of force can be justified, international humanitarian law places significant limits on the means and methods of warfare. The Geneva Conventions of 1949 and their 1977 Protocols set out some of these limits: for example, the prohibitions on targeting civilian populations and civilian infrastructure and causing extensive destruction of property not justified by military objectives.

Intentionally launching an attack knowing that it will cause 'incidental' loss of life or injury to civilians 'which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated' constitutes a war crime at international law. The military objective of disarming Iraq could not justify widespread harm to the Iraqi population, over half of whom are under the age of 15. The use of nuclear weapons in a pre-emptive attack would seem to fall squarely within the definition of a war crime.

Until recently, the enforcement of international humanitarian law largely depended on the willingness of countries to try those responsible for grave breaches of the law. The creation of the International Criminal Court last year has however provided a stronger system of scrutiny and adjudication of violations of humanitarian law. The International Criminal Court now has jurisdiction over war crimes and crimes against humanity when national legal systems have not dealt with these crimes adequately. It attributes criminal responsibility to individuals responsible for planning military action that violates international humanitarian law and those who carry it out. It specifically extends criminal liability to Heads of State, leaders of governments, parliamentarians,

government officials and military personnel.

Estimates of civilian deaths in Iraq suggest that up to quarter of a million people may die as a result of an attack using conventional weapons and many more will suffer homelessness, malnutrition and other serious health and environmental consequences in its aftermath. From what we know of the likely civilian devastation of the coalition's war strategies, there are strong arguments that an attack on Iraq may involve the commission of both war crimes and crimes against humanity.

Respect for international law must be the first concern of the Australian government if it seeks to punish the Iraqi government for not respecting international law. It is clearly in our national interest to strengthen, rather than thwart, the global rule of law. Humanitarian considerations should also play a major role in shaping government policy. But, if all else fails, it is to be hoped that the fact that there is now an international system to bring even the highest officials to justice for war crimes will temper the enthusiasm of our politicians for this war.

Australian Yearbook of International Law Vol 22

<http://law.anu.edu.au/CIPL> under Publications.

Articles

The United Nations in Transitional East Timor: International Standards and the Reality of Governance

Jonathan Morrow and Rachel White

Australia and the International Scrutiny of Civil and Political Rights: An Analysis of Australia's Negotiating Policies, 1946-1966
Annemarie Devereux

A Human Rights Approach to HIV/AIDS: Transforming International Obligations into National Laws
Helen Watchirs

Precaution and Cooperation in the World Trade Organization: An Environmental Perspective
Robyn Briese

Gender and Refugee Law
Anthea Roberts

In Defence of the Use of Public International Law by Australian Courts
Shane S Monks

Recent Arrivals in the Centre

Anthony Forsyth

Anthony has recently joined the Faculty as a Lecturer in industrial and labour law, including international and comparative labour law. He is Assistant Secretary of the International Centre for Trade Union Rights, Australian Committee; and Associate Editor of the Australian Journal of Labour Law.

Dr Melissa Perry

Melissa arrived as a visiting fellow in the Faculty in February and is taking a short break from practice at the bar. She is undertaking research for two publications: one is on native title law and the other is expanding and updating her PhD thesis 'State Succession, Boundaries and Territorial Regimes' for publication.

Research in the Centre

Several Centre members will be embarking on new research projects this year with the support of a grant from the Faculties Research Grant Scheme (FRGS). They are:

Leighton McDonald, *The Judicial Obligation to Give Reasons*

Anne McNaughton, *Crisis, What Crisis? The Insurance Industry Crisis and its Aftermath*

Wayne Morgan, *Sexuality Complaints under Equal Opportunity Law: A Pilot Study*

James Stellios, *Copyright and the Constitutional Freedom of Political Communication in Australia.*

Reports on the progress of their research will appear in future issues of the newsletter.

Recent Publications by Centre Members

Please contact Centre members directly for further information on their publications. The standard email address format is LastnameInitial@law.anu.edu.au

Andrew Byrnes and Hilary Charlesworth

- 'The Illegality of the War against Iraq' (2003) 22(1) *Dialogue* 4-9

Hilary Charlesworth

- 'Women and Human Rights in the Rebuilding of East Timor' (2002) 71 *Nordic Journal of International Law* 325-348 (with Mary Wood)
- 'Terrorism: International Legal Implications' (panel discussion) (2002) 8 *New England Journal of International and Comparative Law* 74-95
- Book review: Anne-Marie Hilsdon, Martha Macintyre, Vera Mackie and Maila Sivens (eds), *Human Rights and Gender Politics: Asia-Pacific Perspectives* (Routledge 2000) and Courtney W. Howland (ed.), *Religious Fundamentalisms and the Human Rights of Women* (St Martin's Press 1999) and Diana G Zoelle, *Globalizing Concern for*

Women's Human Rights: The Failure of the American Model (St Martin's Press 2000) in vol 4 *International Feminist Journal of Politics* Dec 2002

Ann Kent

- Book review: Mel Gurtov, *Pacific Asia?: Prospects for Security and Cooperation in East Asia* (Lanham, Md.: Rowman and Littlefield Publishers, 2002), in *The Journal of Asian Studies* 62 (February 2003), issue 1.

John McMillan

- 'Constitutional reform - or constitutional delusion?' (2003) 14 *Public Law Review* 5-9.

Dennis Pearce

- *Administrative Appeals Tribunal* (LexisNexis Butterworths 2003)

James Stellios

- DJ Harris *International Law Cases and Materials - Australian Supplement*, (2003, Law Book Company) (with JP Fonteyne and Anne McNaughton)

Recent Papers, Presentations and Other Activities by Centre Members

Please contact Centre members directly for further information on their activities. The standard email address format is LastnameInitial@law.anu.edu.au

Andrew Byrnes

- Interviewed by Radio Singapore on the reference of the dispute over the island of Pedra Branca to the ICJ by Singapore and Malaysia, 6 February 2003
- Commentator on panel 'The UN Convention on the Human Rights of Disabled People: Content and Process' at the Disability Studies and Research Institute (DSaRI) conference, Sydney 21 February 2003, comments at <http://www.dsari.org.au/unconvconfnotes.html>

- 'The International Rule of Law and the War against Iraq: The Saga Continues', presentation to the ACT Branch of the Australian Institute of International Affairs, Canberra, 25 March 2003
- 'Quot advocati, tot sententiae: Who's Right and How Do We Know?', panel presentation for the Centre's Confronting Iraq: Does International Law Matter? Current Issues Forum, ANU, 26 March 2003
- Member of panel 'Is a Bill of Rights the answer and do we need constitutional change?', at Writing in Rights - is the time right for an Australian Bill of Rights?, 2003 National Schools Constitutional Convention, Canberra, 28 March 2003
- Various media interviews relating to the war against Iraq

Andrew Byrnes and Hilary Charlesworth

- 'This War is Illegal' *The Age* 19 March 2003

Hilary Charlesworth

- Address at the Jessup Moot Dinner, Canberra, 15 February 2003
- 'The UN Convention System: the World Order and Australia's Position' paper for the Disability Studies and Research Institute (DSaRI) conference, Sydney, 21 February 2003, comments at <http://www.dsari.org.au/unconvconfnotes.html>
- 'Sex, gender and the war in Iraq', paper for the Gender Studies Seminar series, ANU, 5 March 2003
- Chaired the Science, Ethics and War session at the Second Canberra Weekend of Ideas at Manning Clark House, Canberra, 8 March 2003
- Launched 'Fallout: war, terror, refugees' Artlink Australia's March issue, ANU, 14 March 2003

- 'Geese and ganders: the role of international humanitarian law', panel presentation for the Centre's Confronting Iraq: Does International Law Matter? Current Issues Forum, ANU, 26 March 2003
- 'Regulating international law', paper for the Regnet Regulation Conference, ANU, 20-22 March 2003 (with Christine Chinkin)
- 'Unjustified war may yet be a crime' *The Australian*, 24 March 2003 (with Chris Maxwell QC)
- 'The Legality of the War in Iraq', presentation for senior students, Canberra Boys Grammar School, 24 March 2003
- 'Talking about Rights', keynote speech for Writing in Rights - is the time right for an Australian Bill of Rights?, 2003 National Schools Constitutional Convention, Canberra, 27 March 2003
- Various media interviews relating to the war against Iraq

Robin Creyke

- 'Current and Future Challenges in Judicial Review Jurisdiction: A Comment', paper for the Supreme and Federal Courts' Judges Conference, Adelaide, 19-23 January 2003 (publishing shortly in *AIAL Forum*).
- Launched 'The Scope of Judicial Review', the Administrative Review Council's Discussion Paper, ANU, 13 March 2003
- Chaired the session on tribunal operations with guest speaker, Justice Kellam, Victorian Civil and Administrative Tribunal, for ACT Tribunal members, ANU, 7 March 2003.

Anthony Forsyth

- Participated in consultations with a delegation led by Thomas B Moorhead, US Deputy Under-Secretary of Labor, in relation to the labour chapter of the

proposed Australia/USA free trade agreement, Canberra, 19 March 2003

Don Greig

- 'War, Legality and Iraq' *The Canberra Times* 17 March 2003
- 'Force: out on a limb?', panel presentation for the Centre's Confronting Iraq: Does International Law Matter? Current Issues Forum, ANU, 26 March 2003

Ann Kent

- 'Looking behind the veil of war' *Financial Review Weekend Review* 28 March 2003

Penelope Mathew

- 'Privatising international security', panel presentation for the Centre's Confronting Iraq: Does International Law Matter? Current Issues Forum, ANU, 26 March 2003

John McMillan

- 'Tort Liability of Public Authorities - Recent Developments', presentation for continuing legal education seminar, Canberra, 5 February 2003
- 'Trends in Federal Judicial Review of Administrative Action - 2002', presentation for public service seminar, Canberra, 18 February 2003
- 'Bad Oysters - A Government Responsibility?' *The Canberra Times* - Public Sector Information, February 2003

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